95. ***Mobile Wireless Service.*** Consistent with the *SBC/AT&T* **Order** and the *Verizon/MCI Order*, we find that mobile wireless service should be included in the local services product market when it is used as a complete substitute for all of a consumer's voice communications needs."' On the one hand, increasing numbers of mass market consumers are subscribing to mobile wireless services, thus providing an additional access option for making local telephone calls."' On the other hand, we recognize that the average cost for mobile wireless service appears to be higher than for wireline local service."' *In* addition, while most customers making wireline local calls face a per-minute cost of zero (because they can make unlimited local calls for a flat monthly fee), many wireless customers must pay per-minute fees when making local calls with their wireless phones.[276]

96. The record reveals that growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service instead of wireline local service. Evidence indicates that, overall, approximately 6 percent of households have chosen to rely upon mobile wireless service for all of their communications needs."' Recent research sponsored by the Bureau of Labor Statistics reveals that, for certain segments of the U.S. population, a significantly higher percentage of households rely solely on mobile wireless services (*e.g.*, renters (11.8 percent), adults between the ages of twenty-three and thirty-four (9.6 percent), and single individuals (10.5 percent)).[278] We also find that AT&T and BellSouth consider this growing substitution in developing their marketing, research and development,

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[273] The Commission previously found that, although wireline services do not have a price constraining effect on mobile wireless services, some consumers may find that mobile wireless services are a good substitute for wireline services. *SBC/AT&T* **Order,** 20 **FCC** Rcd at 18340-42, paras. 89-90; *Cingular/AT&T Wireless* **Order,** 19 FCC Rcd at 21558, paras. 73-74. **As** we discuss below, we include mobile wireless services **in** the long distance service market to some extent as well.

"'***See,*** *e.g.*, Clyde Tucker *et al.*, Household Telephone Service and Usage Patterns **in** the United States in 2004 at Figures 1, 2. Table B, ***available*** *at* http://www.bls.gov/ore/pdf/st040130.pdf (Household Telephone Survey).

[275] The Commission reports that the average monthly household expenditure for hilled wireline local telephone service is $37, and the average for wireless service is $41. Industry Analysis and Technology Division, FCC, ***Trends in Telephone Service*** at 3-4 (Apr. 2005) ***(Trends in Telephone*** *Service),* ***available*** *at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf. While there are a few carriers offering service plans designed to compete with wireline local service, the two largest, Leap Wireless and MetroPCS, served a combined total **of** 3.7 million customers at the end of 2005 and only offered service in limited portions of 22 states. *Implementation of* ***Section*** *6002(b) of* ***the Omnibus Budget*** *Reconciliation* **Act** *of 1993,* ***Annual Report arid*** *Analysis of Competitive* ***Market Conditions*** *with Respect to* ***Commercial Mobile*** *Services*, WT Docket No. 06-17, Eleventh Report, 21 FCC Rcd 10947, para. 209 (2006) ***(Eleventh CMRS*** *Competition Report*). The price of a mohile wireless plan offered by a national carrier with sufficient anytime minutes **to** accommodate the typical calling needs of a wireline consumer generally costs around $50-$60 per month, which may not make it price competitive for consumers. ***Id.*** at para. 210.

[216] Many consumers have mohile wireless plans in which they are assessed a per-minute charge for each incoming and outgoing call (*e.g.*, prepaid calling plans). Other consumers subscribe to mohile wireless plans with a limited number of anytime minutes with the result that they may incur overage charges for minutes in excess of their allotted anytime minutes. ***See,*** *e.g.*, *Eleventh* ***CMRS*** *Competition* ***Report,*** paras. 93-94; *Cingular/AT&T* ***Wireless Order,*** 19 FCC Rcd at 21613-14, para. 240.

[277] Household Telephone Survey at Table A. BellSouth estimates that 15% of households in its footprint rely solely on wireless for voice communication requirements. BellSouth Info. Req. at 77.

[278] Household Telephone Survey at Tables A, B

and corporate strategies for local service offerings.[279] Finally, we base our finding on the Commission's determination in the *Sprint/Nextel* ***Order*** that Sprint/Nextel after the merger would likely take actions that would increase intermodal competition between wireline and mobile wireless services,[280] as well as Sprint's plans to focus its efforts on encouraging consumers to "cut the cord."[281] Accordingly, our expectation is that intermodal competition between mobile wireless and wireline services will likely increase in the near term. Even if most segments *of* the mass market are unlikely to rely solely upon wireless services instead of wireline local services today,"' our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis.'" Based on the factors discussed in this section, we conclude that mobile wireless services should be included within the product market for local services to the extent that customers rely on wireless services as a complete substitute for, rather than a complement to, wireline services.

(ii) Long Distance Services

97. As with the SBC/AT&T and Verizon/MCI proceedings, there is significant evidence in the record that long distance service purchased on a stand-alone basis is becoming a fringe market, including the 2004 decision by legacy AT&T to cease marketing long distance services?" the declining proportion of consumers choosing a long distance provider different from their local service provider,[285] and other documentary evidence.[286] Nonetheless, because equal access requirements permit a consumer to choose to subscribe to an alternative carrier's long distance service, we follow Commission precedent and consider long distance services as a separate relevant product market. As discussed below, we find that

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[279] AT&T Info. Req., ATT5795-5820; ATT329518 at 329522-524; BellSouth Info. Req., BS196769-196880; BS187427 at 187440-41; BS304103 at 304109. *SBC/AT&T Order*, 20 FCC Rcd at 18341, para. 91 (similar finding regarding AT&T's predecessor, SBC); ***see*** also *Cingular/AT&T* ***Wireless Order;*** 19 FCC Rcd at 21614, para. 241

[280] *Sprint/Nextel* ***Order,*** 20 FCC Rcd at 14017-19, paras. 141-43

[281] Yuki Noguchi, ***Sprint Prepares to Cut the Cord.*** WASHINGTON **POST,** June 6, 2005, at D01

[282] ***See,*** *e.g.*, Consumer Federation **et** *al.* Cooper/Roycroft Decl. at 19-21 (wireless subscription is expensive compared to wireline; it **is** not compatible with household alarm systems, satellite TV and digital video recorders, and may not be E911 compatible); Cbeyond **et** *al.* Comments at 48 (wireless lacks the ubiquity and service quality to he a suitable substitute for wireline); New Jersey Ratepayer Advocate Baldwin/Bosley Decl. at paras. 102, 118-24 (wireless services are a complement to, not substitute for, wireline services in most cases).

[283] *See, e.g.*, AT&T Info. Req., ATT5795-5820; ATT316765-767; ATT329518 at 329522-524 (**[REDACTED])**

[284] AT&T/BellSouth Application at 84-86

[285] Between March 2005 and May 2006, the percentage of BellSouth's residential lines with BellSouth as the presubscribed interexchange carrier increased from **[REDACTED]%** to **[REDACTED]%.** Over the same time period, the percentage of legacy AT&T residential lines with AT&T as the presubscribed interexchange carrier fell from **[REDACTED]**% to **[REDACTED]**%, and the legacy AT&T long distance customer base fell **[REDACTED]%** nationwide and **[REDACTED]%** in the BellSouth region. We note that during this time legacy AT&T implemented numerous rate increases in its long distance charges to "harvest" these customers. **See** *generally* BellSouth Info. Req., Exh. 36.a.i.001; AT&T Info. Req., Exh. 37a, 38b; **see** *also SBC/AT&T Order*, **20** FCC Rcd at 18348. para. 103.

[286] AT&T Info. Req., ATT5795 at 5821-27 **([REDACTED])**

this market includes not only presubscrihed wireline long distance providers, but also mobile wireless service and transaction services, such as prepaid calling cards and dial-around services. [287]

98. ***Mobile Wireless.*** We find it appropriate to include mobile wireless services in the relevant market at least to some extent based upon usage substitution between wireless and wireline long distance service, although the precise extent of the substitution is unclear. The Commission previously has noted mobile wireless providers' increased offering of wide-area pricing plans,[288] and that consumers are switching minutes of long distance usage from wireline to mobile wireless services.[289]

99. In evaluating the substitutability of wireless service for stand-alone long distance service, our analysis focuses on the behavior of those consumers that currently subscribe to both a wireline long distance service and a mobile wireless service.[290] Evidence suggests that consumers are increasingly using their mobile wireless service for long distance calls,?"'and that AT&T and BellSouth consider minute substitution in their business strategies.'" **As** a general matter, we expect that a consumer who subscribes to both a mobile wireless service and a wireline long distance service will allocate minutes between these services in an optimal manner, *i.e.*, the consumer will seek the lowest possible charge based on the time of day the call is placed and consistent with the desired service quality. While we have insufficient information in this record to determine the precise extent of wireless long distance minute substitution, we acknowledge that mobile wireless services are in the relevant product market at least to some extent.

100. *Transaction Services.* Certain segments of mass market consumers use transaction services (prepaid calling cards and dial-around services) as a substitute for subscription long distance services. We have found that prepaid cards are used by consumers who cannot otherwise afford traditional long distance, wireless service, or a home phone; who travel frequently; or who have very targeted calling needs.[293] We have insufficient information to determine the precise extent of consumer substitution

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[287] There is insufficient information in this record to assess the extent to which mass market consumers use facilities-based and over-the-top VoIP services specifically for domestic long distance calls.

[288] ***See, e.g., Eleventh CMRS Competition Report,*** para. 90.

[289] ***See Federal-Sfate Joint Board on Universal Service,*** **WC** Docket No. 06-122, Report and Order and Notice **of** Proposed Rulemaking, 21 **FCC** Rcd 7518, 7532-33, para. 25 (2006) ***(Universal Service Contribution Methodology)*** (according to a traffic study conducted by TNS Telecoms for TracFone Wireless, the (then) seven large national mobile wireless service providers' interstate minutes of use ranged from 11.9% to 37.1%); ***see also Trends in Telephone Service*** at 11-2. However, the long distance usage data in the record are for mass market and **all** business customers combined, and thus cannot be used to infer the calling patterns for mass market consumers alone.

[290] Our market definition analysis does not consider the purchasing behavior of consumers who do not have a presubscribed interexchange carrier or who rely upon mobile wireless service for all of their communications needs, because they would be unaffected by a theoretical price increase for wireline long distance services as a result of the merger. In addition, we do not consider the purchasing behavior of consumers who do not currently subscribe to a mobile wireless service because it would most likely be more costly for these consumers to subscribe to a mohile wireless service in order to migrate wireline long distance minutes to a mobile wireless service than it would **be** to pay a higher price for wireline long distance service.

[291] *Trends in Telephone Service* at 11-2

[292] BellSouth Info. Req., BS187427 at 187452-54; AT&T Info. Req., ATT5431-5453.

[293] ***See SBC/AT&T Order, 20*** **FCC** Rcd at 18343, para. 94, n.290

between transaction services and presubscribed wireline long distance services. However, we include these services in the relevant market definition to the extent that consumers view them as substitutes for presubscribed wireline long distance service. In any event, to the extent that these services are part of the relevant market, they appear to be of declining significance.'"'

(iii) **Bundled** Local **and Long Distance** Services

101. **Wc** agree with the Applicants and commenters that it remains appropriate to treat bundled local and long distance services as a separate relevant product market.'" Because of the varied marketing strategies and limitations in the data, we define a local and long distance service bundle."' for purposes of this proceeding only, as a customer's purchase of local and long distance services from the same carrier, regardless of whether these services are purchased together as part of an advertised bundle from a single carrier or whether the consumer creates the bundle by selecting separately-offered local and long distance service plans from the same provider. The evidence indicates that consumers predominantly purchase local and long distance services from a single provider today. This trend is likely to continue, and the stand-alone wireline long distance market is steadily declining in size relative to the bundled services market.[297]

102. Several other factors also convince **us** that it is appropriate to define bundled local and long distance services as a separate relevant product market. First, we find that the Applicants' marketing and pricing strategies are designed to encourage subscription to a bundled service package.[298] Second, the

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[294] AT&T Info. Req., ATT2517 at 2518-25 ([REDACTED]); ***id.*** at ATT2940 at 2945. ***See*** *also* ***SBC/AT&T Order,*** 20 FCC Rcd at 18343-44, para. 94.

[295] ***See SBC/AT&T Order,*** 20 FCC Rcd at 18344-45, paras. 95-96; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18485-86, paras. 96-97; AT&T/BellSouth Application at 87; Consumer Federation ***er al.*** Cooper/Roycroft Decl. at 17-18; Cbeyond *et al.* Petition at 29. The Commission has previously noted the increased subscription to bundled telecommunications service offerings. ***See, e.g., Section 272 Sunset FNPRM,*** 18 FCC Rcd at 10919, para. 9.

[296] The economics literature generally discusses two types of bundles: a pure bundle, where the bundled services are only sold together and are not sold individually; and a mixed bundle, where the bundled services are sold individually, as well as in a package. In a mixed bundle, the package generally is sold at a discount relative to the sum of the individual service component prices. ***See, e.g.***, Barry Nalebuff, ***Bundling, Tying and Portfolio Effects,*** DTI Economics Paper No. 1 (2003) at 14-15, ***available*** *at* **http://www.dti.gov.uk/files/file14774.pdf.** There is significant variation across providers as to whether they offer a pure bundle or a mixed bundle of communications services.

[297] As of May 2006, [REDACTED] of BellSouth's retail local consumer lines have BellSouth as a presubscribed interexchange carrier. ***See*** BellSouth Info. Req., Exh. 36.a.i.001. The legacy AT&T stand-alone long distance customer base declined [REDACTED]% nationwide and [REDACTED]% in the BellSouth region between March 2005 and May 2006. AT&T Info. Req., Exh. 37a, 38b. We note that the Commission had anticipated that a bundled product market might become a relevant product market sometime after the BOCs completed the section 271 process. ***See,*** *e.g.*, *Bell Atlantic/NYNEX* ***Order,*** 12 FCC Rcd at 20010-11, paras. 39-42; *WorldCom/MCI* ***Order.*** 13 FCC Rcd at 18038-39, para. 22 n.60. AT&T's predecessor, SBC, completed the section 271 process in October 2003.

[298] AT&T's documents reveal that its research and development, marketing, and corporate strategies focus upon service offerings designed to encourage consumers to subscribe to a local and long distance service bundle. AT&T's incentive is to drive consumers to purchase all telephone services from AT&T to reduce its marketing costs and churn, as well as to increase its average revenue per user. AT&T Info. Req.. ATT316635-52; ATT342653. BellSouth documents reveal similar strategies. BellSouth Info. Req.. BSI 87427 at 18753; BS264001 at 264018-21.

evidence in the record indicates increasing intermodal competition is likely between wireline services and services provided on alternative service platforms such as facilities-based VoIP and mobile wireless. These intermodal services tend to be offered as a bundle of local and long distance services.[299] These findings suggest that competition is increasingly occurring between bundled offerings rather than between a bundle and stand-alone local and long distance services offered by separate providcrs.

b. Relevant Geographic Market

103. **As** with special access and enterprise services, we conclude that the relevant geographic market for mass market local, long distance, and bundled local and long distance services is the customer's location.[300] We then aggregate customers facing similar competitive choices. Consistent with the approach adopted in, and for the reasons given in, the *SBC/AT&T Order* and the *Verizon/MCI* ***Order,*** we analyze local, long distance, and bundled local and long distance services in BellSouth's franchise area within each state. We do not analyze market shares in AT&T's franchise territories because BellSouth does not offer mass market services in AT&T's franchise areas, with the exception of mobile wireless services. It does not compete with AT&T in the wireless service market because BellSouth and AT&T share ownership of their wireless affiliate, Cingular.[301]

104. Some commenters argue that we should analyze geographic markets smaller than states.[302] We recognize that consumers may face different competitive choices in different locations within a state (*e.g.*, in some areas of a state, cable companies may provide VoIP, while in other areas they may not). Although we recognize that, in theory, using a state-level analysis may mask some variations in smaller geographic areas, given the limitations of available data, we find a state-wide approach to be reasonable, particularly given that BellSouth prices many of its product offerings on a statewide basis. Accordingly, we analyze mass market local, long distance, and bundled local and long distance services in BellSouth's franchise area within each state.

c. Market Participants

105. As the foregoing indicates, BellSouth and AT&T face competition from a variety of providers of retail mass market services. These competitors include competitive wireline local exchange carriers

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[299] Promotional information for facilities-based VoIP providers generally appears to focus on bundled offerings. ***See. e.g.,*** Optimum Voice, What is It? (visited Sept. 6, 2006) http://www.optimumvoice.com/index.jhtml (Cablevision's product "offers unlimited local, regional and long-distance calling within the United States, Puerto Rico and Canada"); Comcast, Services for You (visited Sept. 6,2006) http://www.comcast.com/Benefits/VoiceBenefits.ashx?.link1k=59 (offering "unlimited local and long distance"); Time Warner Cable. Unlimited Calling (visited Sept. 6, 2006) http://www.timewarnercable.com/corporate/products/digitalphone (offering "unlimited calls anywhere in the U.S. and Canada For one low monthly price").

[300] ***See supra*** Parts V.B (Wholesale Special Access Competition), V.C (Retail Enterprise Competition).

[301] ***See*** AT&T/BellSouth Boniface Decl. at para. 35. Only residents of BellSouth's 9-state region can order wireline service from its webpage. ***See*** BellSouth, BellSouth Local Phone Service and Calling Plans (visited Sept. 20, 2006) http://www.bellsouth.com/consumer/local/index.html. For its part, AT&T is **no** longer **a** price-constraining force in mass market services in BellSouth territory. ***See*** AT&T/BellSouth Application at 86; AT&T/BellSouth Boniface Decl. at para. 35; AT&T/BellSouth Kahan Decl. at paras. 46-48.

[302] **New** Jersey Ratepayer Advocate Baldwin/Bosley Decl. at paras. 108-09; Cbeyond *et al.* Comments at 30

and long distance providers, facilities-based VoIP providers, cable circuit-switched service oroviders, and wireless carriers, to the extent consumers use their services as a replacement for local or long distance services.[301]

2. Competitive Analysis

a. Horizontal Effects

106. *Unilateral Effects.* As discussed below, and consistent with the Commission's findings in the *SBC/AT&T Order*,[304] we find that AT&T's acquisition of BellSouth is not likely to result in anticompetitive effects for mass market services due to AT&T's actions to cease marketing and gradually withdraw from providing local service, long distance service, and bundled local and long distance service to the mass market outside of the SBC region."' We also conclude that competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come.

107. We begin our analysis by examining the market shares of AT&T and BellSouth, plus supply and demand factors. In general, the market share calculations indicate a high level of concentration in most franchise areas in the BellSouth states for all relevant services.[306] Within BellSouth's franchise areas, its median market share for local services increases from [REDACTED] percent to [REDACTED] percent,[307] with a post-merger market share range of [REDACTED] percent to

[301] As discussed above, we do not include over-the-top VoIP for purposes of this market analysis. *See supra* para. 94. In any event, AT&T states that its customer base of over-the-top VoIP customers in BellSouth territory is small. AT&T/BellSouth Reply at 53; AT&T Info. Req., Exh. 37.b.

[304] *SBC/AT&T Order*, 20 FCC Rcd at 18346. para. 101

[305] AT&T/BellSouth Application at 84-86; AT&T/BellSouth Kahan Decl. at paras. 46-48

[306] We discuss the Applicants' market shares before and after the merger instead of HHIs for each geographic market because we do not have sufficient market share information for all of the significant competitors in these markets. Market share calculations for each of SBC's franchise areas are provided in Appendix D. Our analysis of concentration in the mass market relies upon data for residential customers because of the administrative difficulty of distinguishing small business data from data for other classes of businesses. The Commission has previously found that residential and very small businesses have similar patterns of demand, are served primarily through mass marketing techniques, purchase similar volumes and communications services, and would likely face the same competitive alternatives within a geographic market. Thus, we conclude that an analysis of market share of residential consumers is likely to accurately represent the Applicants' position in the mass market. *Cf. SBC/AT&T Order,* 20 FCC Rcd at 18347, para. 102; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20016, para. 53; *Implementation of the Local Competition Provisions of the Telecommunications Act* of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3829, para. 293 (1999); *SBC/Ameritech Order,* 14 FCC Rcd at 14746, para. 68.

[307] We estimate total residential local access lines in each relevant geographic market by summing the number of wireline local access lines and an estimate of the number of residential wireless-only lines. We estimate BellSouth's share of residential wireless-only lines in the relevant markets by taking the BLS estimate of wireless-only consumers of 6%, a conservative figure, and multiplying it by an estimate of Cingular's share of mobile wireless lines in the NRUF databasc. *See* Household Telephone Survey at Table A. Although BellSouth cites a higher percentage of wireless-only consumers in its region, it did not provide supporting data. BellSouth Info. Req. at 77. We note that interconnected VoIP providers have been required to provide 911 service since November 2005, so they should be (continued....)

[REDACTED] percent. Similarly, within the BellSouth franchise areas, its median market share of long distance services will increase from **[REDACTED]** percent to **[REDACTED]** percent, with a post-acquisition market share range from **[REDACTED]** percent to **[REDACTED]** percent."' Finally, within the BellSouth franchise areas, its median market share for bundled local and long distance services will increase from **[REDACTED]** percent to **[REDACTED]** percent, with a post-acquisition market share range of **[REDACTED]** percent to **[REDACTED]** percent."" Because these market shares suggest potentially problematic levels of concentration, we must next evaluate other aspects of the market.

108. Although we agree with commenters that the Applicants' post-merger market shares for the relevant products are high,"" we nonetheless find that these numbers significantly overstate the likely competitive impact of the merger. Regardless of the role legacy AT&T played in the past, its withdrawal from the mass market outside of the SBC region means the legacy AT&T infrastructure is not a significant provider (or potential provider) of local service, long distance service, or bundled local and long distance service to mass market consumers in the BellSouth region.[311] The record demonstrates that once legacy AT&T determined that mass market services were no longer a viable business opportunity, it implemented steps to close down its mass market operations."' We reject as speculative and unrealistic commenters' suggestion that AT&T is a potential mass market competitor in BellSouth territory on the grounds that it could readily reverse this decision.[313] Thus, we agree with the Applicants that AT&T is not a significant present or potential participant in these markets.

(Continued from previous page)
captured by E911 listings. ***See IP-Enabled Services:*** *E911 Requirements for* ***IP Enabled Service Providers,*** WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking. 20 FCC Rcd 10245, 10246, 10256-58, para. 1, n.1, 23-24 (2005) ***(VoIP 911 Order).***

[308] Our calculations for the long distance market include only those consumers with a wireline long distance presubscribed carrier. We have no information to estimate the extent to which consumers may be able to migrate long distance minutes lo their mobile wireless service or prepaid calling cards. Thus, we recognize that these market shares are likely to overstate AT&T's post-merger share of the long distance market.

[309] With respect to bundled local and long distance market shares, we follow a methodology similar to that employed in calculating BellSouth's share of local services, described above at note 307.

[310] ***See*** New Jersey Ratepayer Advocate Comments at 8; New Jersey Ratepayer Advocate Baldwin/Bosley Decl. at paras. 31, 176-82; Consumer Federation *et al.* Petition at 39.

[311] ***See SBC/AT&T Order, 20*** FCC Rcd at 18348, n.312. Legacy AT&T stated that it found it difficult to compete for mass market local exchange customers for a variety of reasons, including competition from facilities-based intermodal providers, such as cable companies and wireless carriers; cornpetition from other VoIP providers; competition from other wireline carriers; and the D.C. Circuit's vacatur of the unbundling rules set forth in the ***Triennial Review Order,*** to which the Commission responded by phasing out competitive LEC access to UNE-P at TELRIC prices. *See* ***also*** AT&T/BellSouth Reply at 48.

"'See AT&T/BellSouth Reply at 48-52.

[313] *See, e.g.,* Access Point *et al.* Petition at 7-10; Cbeyond *et al.* Comments at 35-45; Earthlink Petition at 18-20; MSV LLC Comments at 5.

109. Similarly, we find that BellSouth is not a competitor for mass market communications services in AT&T's region."[314] Further, we note that the record evidence indicates that the Applicants' current and future pricing incentives are based more on likely competition from intermodal competitors than from competitive LECs.[315]

110. Finally, we reject commenters' other arguments that consumers will be worse off after the merger. The New Jersey Ratepayer Advocate expresses concern that the merged entity will focus on lucrative video and wireless markets, and stop investing in basic wireline service to the detriment of a number of consumers.[316] Fones4All raises a concern regarding its ability to offer competing mass market services because of the prices charged for unbundled local switching and two-wire loops.'"[317] Other commenters raise general concerns regarding the impact of the merger on some classes of consumers.[318] We find the concerns regarding Applicants' post-merger business plans to be speculative.'"[319] Indeed, the

[314] AT&T/BellSouth Boniface Decl. at para. 35. As discussed above, both BellSouth and AT&T market wireless services on a nationwide basis, but they do so through their wholly-owned joint venture. Cingular. Thus. they do not compete with each other in offering wireless services.

[315] *See. e.g.*, BellSouth Info. Req.. BS196769-880.

[316] New Jersey Ratepayer Advocate Comments at 20-21 (merged company will relegate telephone service to the "back seat"); New Jersey Ratepayer Advocate Baldwin/Bosley Decl. at paras. 231-45 (increase in installation intervals supports claim that service quality is declining in Applicants' territories); *see also* Consumer Federation et al. Petition at 7-8 (AT&T and local cable company will target high-end consumers with bundles, while less affluent consumers will be left on the sidelines); Fones4All Comments at 13 (merged company will focus on new services over their wireless and IPTV networks);

[317] Fones4All Comments at 19-20; Fones4All Condition Comments; Letter from Ross A. Buntrock, Counsel for Fones4All Corporation, to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed Nov. 30,2006); Letter from Nicholas N. Owens, National Ombudsman, U.S. Small Business Administration. to Eric Malinen, Senior Legal Advisor, Office of Communications Business Opportunities. FCC, WC Docket No. 06-74 (tiled Oct. 20, 2006) (noting that the Office of the National Ombudsman received a complaint from Mr. Buntrock on behalf of Fones4All). *But see* Letter from Gary L. Phillips, Gen. Atty and Asst. Gen. Counsel. AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket 06-74 (filed Oct. 4,2006) (disputing Fones4All's allegations and arguing that they are not merger specific). Similarly, the Resale Joint Commenters and Momentum Telecom. Inc. argue that Applicants have attempted to eliminate their ability to provide consumers with resold telephone services. *See* Resale Joint Commenters Comments at 5-10; Letter from Rick Richardson, General Counsel, Momentum Telecom, Inc., to Marlene H. Dortch, Secretary. FCC, WC Docket No. 06-74 (filed Oct. 5, 2006): Resale Joint Commenters Condition Comments at 3-6; Letter from John J. Heitmann, Counsel for Resale Joint Commenters, to Kevin J. Martin, Chairman, FCC *et al.*, WC Docket No. 06-74 (filed Dec. 13, 2006); *but see* Letter from Bennett L. Ross, General Counsel - D.C., BellSouth D.C., Inc., to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed Dec. 4,2006) (disputing Resale Joint Commcnters allegations and arguing that they are not merger specific).

[318] *See, e.g.*, Letter from Deacon Dana Williams, Chairman, Georgia ACORN. to Chairman Kevin Martin *et al.*, WC Docket No. 06-74 (filed Sept. 18,2006)("the proposed merger of AT&T and BellSouth could harm low and moderate income families"); Letter from Rudy Arrcdondo. President and CEO, National Latino Farmers and Ranchers Trade Association, to Chairman Kevin Martin *et al.*, WC Docket No. 06-74 (filed Sept. 22, 2006) (expressing concerns that the merger will harm "minority small businesses in some of the most rural parts of the country").

[319] We note that many aspects of service quality are regulated. *See, e.g.*, 47 C.F.R. § 6.1 et *seq.* (access to telecommunications service and equipment by persons with disabilities). Consumers with complaints regarding the quality of their telephone service should contact their state regulatory agency or the Commission at http://www.fcc.gov/cgb/complaints.html.

Applicants claim that the merged company will spend more on innovation and network infrastructure than the total spent by the individual companies before the proposed merger."' Further, the commenters have not established that these concerns are merger specific, and so we decline to address them in the context of this proceeding.

111. *Coordinated Effects.* We also find that AT&T's acquisition of BellSouth is unlikely to result in anticompetitive effects through coordinated interaction among remaining competitors. Given our finding that neither AT&T nor BellSouth is a significant mass market participant outside its region. we find no indication that the proposed acquisition increases the likelihood of coordinated interaction for the relevant products. Moreover, the increasing trend toward bundled service offerings likely decreases the possibility of coordinated interaction. Because of the complexity and variety of the bundled local and long distance service offers, competitors will find it difficult to coordinate on prices.'"

b. Vertical Effects

112. We also are not persuaded by commenters' claims that the merger will increase the merged entity's incentive and ability to raise the costs of mass market rivals.'" We discussed these vertical concerns in our analyses of the wholesale special access market and in other sections of this Order.'"

E. Mass Market High-speed Internet Access Competition

113. In this section, we consider the competitive effects of the proposed merger in the markets for mass market high-speed Internet access services.[324] We find that the merger is not likely **to** result in anticompetitive effects for mass market high-speed Internet access services. Specifically, we conclude that the merger is not likely to cause horizontal anticompetitive effects because neither AT&T nor

[320] AT&T/BellSouth Application at 47-48

[321] The difficulties in coordinating actions may be exacerbated not only by the bundling of local and long distance services but also by the offering of discounts to consumers that purchase additional services from the providers. ***See.*** *e.g.*, ***DOJ/FTC Guidelines*** § 2.1.1 ("Reaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects **of** their rivals' businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may he limited or impeded by firm heterogeneity, for example, differences in vertical integration or the production of another product that tends to he used together with the relevant product.").

[322] **See.** *e.g.*, Cbeyond *et al.* Comments at 8-9 (expressing concern that the merged company would have increased incentive and ability to raise retail rivals' costs in a greatly increased geographic area); Sprint Nextel Comments at 3-12 (expressing concerns about merged entity's ability to discriminate against competing wireless carriers in the pricing and/or provisioning of wholesale ***inputs;*** Applicants compete with Sprint Nextel for mass market minutes directly through Cingular and through intermodal channels).

[323] ***See supra*** Part ***V.B*** (Wholesale Special Access Competition); ***infra*** Part **V.F** (Internet Backbone Competition).

[324] The Commission's ***Fourth Section*** 706 ***Report*** contains a detailed description of high-speed Internet access via various technologies. ***See generally Inquiry Concerning rhe Deployment*** *of Advanced Telecommunications Capability* to ***AI/ Americans in a Reasonable and*** *Timely Fashion,* ***arid Possible*** *Steps to* ***Accelerate*** *Such Deployment* ***Pursuant*** to ***Sectiori*** 706 *of the Telecommunications Act* of ***1996.*** GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208 (rel. Sept. 9, 2004) (***Fourth Sectiori*** 706 *Report*). The report defines "high-speed" lines as those lines that have a 200 kilobits per second (kbps) or greater transmission speed in at least one direction. See ***id.*** at 8.

BellSouth provides any significant level of mass market Internet access service outside of its respective region. We further conclude that, while the merger will result in some vertical integration, the record does not support commenters' arguments that the merger will increase AT&T's incentive to act anticompetitively with respect to mass market high-speed Internet access services.

1. Relevant Markets

114. As the Commission has previously found, high-speed Internet access services, as distinct from narrowband services, constitute a relevant product market for purposes of determining the effects of a proposed merger on the public interest.'" The Commission also has found previously that the relevant geographic markets for residential high-speed Internet access services are local.[326] We believe that both of these market definitions remain appropriate for the purpose of our public interest analysis.

2. Competitive Analysis

a. Horizontal Effects

115. The record demonstrates that AT&T does not actively market mass market Internet access services out-of-region, nor does it plan to implement a major out-of-region marketing initiative.'" The record also demonstrates that BellSouth does not provide any out-of-region high-speed Internet access service offerings, nor does it appear that it plans to do so.[328] Based on the record evidence, we thus conclude that the proposed merger has no horizontal effects.

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[325] See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and subsidiaries. debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiariesj, Assignees; Adelphia communications Corporation, (and subsidiaries. debtors-in-possession), Assignors and Transferors, to Comcasr Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor. Io Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee.* MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8295, para. 212 (2006).

[326] See *id.* at para. 217.

[327] See AT&T/BellSouth Application at 105 (stating that AT&T offers residential Internet access services primarily within its 13-state region). AT&T does have a wholesale agreement with Covad to offer DSL services out-of-region, but AT&T has only a limited number of customers through that arrangement. *See id.* at 106. We therefore reject commenters' assertions that AT&T is BellSouth's most significant potential mass market broadband competitor. See, *e.g.*, CDD Petition at 6; Consumer Federation *et al.* Cooper/Roycroft Decl. at 24-25; Earthlink Petition at 9-18. Despite AT&T's agreement with Covad, AT&T only has 3,000 DSL customers in BellSouth's region, a decline of nearly 20% from a year ago, and it is not engaged in active marketing of this service. See AT&T/BellSouth Reply at 54. Additionally, AT&T holds no spectrum in BellSouth's region that could he used for mass market services, other than a 2.3 GHz license covering one county in rural Kentucky. *See id.* at 55. AT&T is testing wireless broadband services in Alpharetta and Atlanta, Georgia to consumer and enterprise business customers. *See* Letter from Joan Marsh, Executive Director – Federal Regulatory Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. (tiled May 9, 2006); see *also* AT&T Info. Req., ATT259496 at 259499,259520,259522 ([REDACTED]); AT&T Info. Req., ATT383921 at 383927 ([REDACTED]).

[328] We reject commenters' claims that BellSouth is a potential broadband competitor in AT&T's region using wireless technologies. See, *e.g.*, CDD Petition at 6; Consumer Federation *et a/.* Cooper/Roycroft Decl. at 24-25. Although BellSouth holds WCS spectrum in AT&T's region, the merged entity would only hold a small fraction of this spectrum and additionally many other available spectrum bands can provide the same service as this spectrum.

(continued...)

b. Vertical Effects

116. Several commenters claim that the vertical integration created by the proposed merger will give the merged entity an incentive to limit consumers' access to unaffiliated content and/or applications on the Internef by either: (a) blocking consumer access; (b) injecting latency into the consumers' high-speed Internet access service; and/or (c) mandating that the consumer pay more for access to unaffiliated content and applications.[329] In addition, several commenters have alleged that the merged entity will have increased incentive to discriminate against unaffiliated ISPs.[330] For the reasons given below, we conclude that given the competitive nature of the broadband market, the proposed merger is not likely to increase incentives for the merged entity to engage in conduct that is harmful to consumers or competition with respect to the delivery of Internet content, services, or applications.

117. We agree with Applicants that there is substantial competition in the provision of Internet access services.[331] Broadband penetration has increased rapidly over the last year with more Americans relying on high-speed connections to the Internet for access to news, entertainment, and communication.[332] Increased penetration has been accompanied by more vigorous competition. Greater

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See AT&T/BellSouth Reply at 55; *infra* para. 178 (noting the availability of spectrum blocks). Further, BellSouth only provides Internet access services exclusively wifhin its region. ***See*** AT&T/BellSouth Application at 106.

[329] ***See.*** *e.g.*, CDD Petition at 3-4 (asserting that "the Commission should take Mr. Whitacre's own words at face value" on his "repeated promises to use AT&T's market power to extract revenue from Internet users"): CDD Condition Comments: Concerned Mayors Alliance Petition at 25 (asserting that "[i]t is no secret that AT&T does not want to permit open access to its network facilities for competing Internet service providers"); Consumer Federation ***er al.*** Petition at 51-2 (arguing that "AT&T can easily (1) identify the customer which has [chosen to use a non-AT&T Internet technology to access video programming], and (2) assign lower priority to the delivery of this content, thus degrading the [non-AT&T] technology, (3) designate the consumers who purchase their content from non-AT&T sources as 'heavy users' who take 'excessive bandwidth,' and (4) charge these end users (whose only offence is to make **a** competitive choice) more than those customers who purchase AT&T-sourced content"); Georgia PSC Comments at 2 (arguing that "[c]onsumers may he required to purchase their provider's applications or suffer through much slower access and having to pay additional amounts for adequate access"): **It's** Our Net Coalition Condition Comments; Center for Creative Voices in Media Condition Comments: Letter from Mark J. O'Connor, Counsel for Earthlink. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Oct. 6, 2006): ***bur see*** AT&T/BellSouth Reply at 82 (arguing that opponents of the merger provide nothing more than conclusory assertions without any economic or other analytical explanations **as** to how the proposed merger will lead to anticompetitive Internet behavior): Letter from Gary L. Phillips, AT&T Inc. and Bennett L. Ross, BellSouth Corp, to Marlene H. Dortch, Secretary. FCC. WC Docket No. 06-74 (filed Oct. 4, 2006): Letter from Brad E. Herr, President, AC Data Systems, Inc., and Jack Field, VP Global Connectivity Solutions, ADC Telecommunications, to Kevin J. Martin, Chairman, FCC, WC Docket No. 06-74 (tiled Oct. 24, 2006) (arguing thaf telecom manufacturing companies are opposed to "network neutrality" regulation); United States Internet Industry Association Condition Comments: New Jersey Rafepayer Advocate Condition Comments at 8-9; Georgia PSC Condition Comments, Attach. at 3.

[330] ***See,*** *e.g.*, FISPA Condition Comments; Raw Bandwidth Communications, Inc. Condition Comments at 4-5, 9-10 NetZero Condition Comments at 3-5; T-Mobile Condition Comments at 6-9; Letter from Ronald W. Del Sesto, Jr., Counsel for NetZero, Inc., to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed Dec. 27, 2006): Georgia PSC Condition Comments, Attach. at 3-4.

[331] **See** AT&T/BellSouth Application at 108; **see** *also* BellSouth Info. Req., BS262957 at 262957 [REDACTED]: BellSouth Info. Req., BS267460 at 267460-75 [REDACTED].

[332] At the end of 2000, 84.6% of U.S. households with Internet access were dial-up customers. ***See*** *Annual* ***Assessment*** *of the Status of Competition in the Market for the Delivery of Video Programming*, ***CS*** Docket 01-129, (continued....)

competition limits the ability of providers to engage in anticompefitive conduct since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded. In particular, cable providers collectively continue to retain the largest share of the mass market high-speed Internet access market.[333] Additionally, consumers have gained access to more choice in broadhand providers.'"' Moreover cable modem service and DSL service are facing emerging competition from deployment of cellular. Wi-Fi, and Wi-Max-based competitors, and broadband over power line (BPL) providers.'"' Commission statistics indicate that satellite and wireless broadband lines more than sextupled between December 2004 and December 2005, from 549,621 to 3,809,247, with BPL lines increasing 20 percent between June 2005 and December 2005.[336] Given these alternatives, if the merged entity sought to discriminate against competing content or service providers, it would risk losing customers to competing broadband service providers. Thus, **we** find that the strong and increasing

(Continued from previous page)
Eighth Annual Report, 17 FCC Rcd 1244, 1265, para. 41 (2002) (*Eighth Annual Video Competition Reporr).* Now, high-speed Internet access rivals that at dial-up: of the 70.3 million households with Internet access in June 2005. **33.7** million (or 48%) had high-speed access. See *Annual Assessment of the Status of Competition in the Marker for rhe Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2501, 2567, para. 137 (2006) (*Twelfth Annual Video Competition Reporr).* More recent data suggests that the number of high-speed lines grew to over SO million by December 2005. *See* Industry Access and Technology Division, FCC, *High-Speed Servicesfor Internet Access: Status as of December-31, 2005.* July 2006, at Table I *(High-Speed Services Dec. 2005 Report) available ar* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf; see *also* AB Bernstein Research, *Broadband Update: "ValueShare" and "SubscriberShare" Have Diverged,* Apr. 7, 2006 (*Bernstein Broadband Update)* at 1-2 (stating that "[d]uring 4Q05, Internet penetration (including both dial-up and broadband connections) as a percentage of U S. households increased 70bps [basis points] to 64%, or around two-thirds of all households" and has been gradually accelerating).

[333] **See** *High-speed Services Dec. 2005 Reporr* at 3 (stating that for high-speed lines, *i.e.*, lines connecting to the Internet that exceed 200 kbps in at least one direction, designed to serve primarily residential end users, 57.5%' were cable modern lines); *id.* at Table 4 (depicting that for residential advanced services lines, *i.e.*, lines connecting to the Internet that exceed 200 kbps in both directions, 62.4% were cable modem lines); see *also* AT&T/BellSouth Reply at 88-89 (asserting that gains in DSL providers against cable modem providers demonstrate the competitive nature of the marketplace).

[334] For example, while the percentage of zip codes served by only one broadband provider has dropped from 14.9% in 2001 to 5.6% in 2005. the percentage of zip codes served by four or more broadhand providers has increased from 46.3% in 2003 to 66.6% in 2005. *See High-speed Services Dec. 2005 Report* at Table 15; *infra* Part **V.H** (finding that there **is** spectrum available for wireless broadband opportunities).

[335] Wireless-Fidelity (Wi-Fi) is an interoperability certification for wireless local area network (LAN) products. This term has been applied to devices developed in accordance with the Institute of Electrical and Electronics Engineers (IEEE) 802.11 standard. *Twelfth Annual Video Competition* ***Report,*** 21 FCC Rcd at 2604, para. 225. n.785. Wi-Max **is** a wireless standard, embodied in IEEE Standard 802.16, that can provide wireless high-speed Internet access with speeds up to 75 Mbps and ranges up to 30 miles. *Id.* at 2604, para. 226. BPL is a new type of carrier current technology that provides access to high-speed broadband services using electric utility companies' power lines. ***See*** *Amendment of Parr* ***15*** *Regarding* ***New*** *Requirements and Measurement Guidelinesfor* **Access** *Broadband* ***Over*** *Power Line Systems, Carrier Current Systems, Including Broadband Over* ***Power*** *Line Systems,* 19 FCC Rcd 21265, 21266 (2004); see *also* 47 C.F.R. § 15.3(ff) (defining the term "Access BPL").

[336] *High-speed Servicesfor Internet* ***Access:*** *2005 Status Reporr* **at** Table 1. **A** separate FCC report indicates that cellular-based high-speed Internet access service "has been launched in at least some portion of counties containing 278 million people. or roughly 97 percent of the **U.S.** population . . .." *Implementation of Secrion 6002(b) of* ***the*** *Omnibus Budget Reconciliation Act of 1993 (Annual Report and Analysis of Competitive* ***Marker*** *Conditions With* ***Respect to*** *Commercial Mobile* ***Services),*** 20 FCC Rcd 15908, 15953-54, para. 119 (2005).

competition for mass market high-speed Internet access services will limit the incentives and ability of the merged entity to discriminate.

118. Further, there is no record evidence indicating that either of the Applicants has willfully blocked a web page or other Internet content, service, or application via its high-speed lnternet platforms.[331] Commenters and petitioners do not offer evidence that the merged entity is likely to discriminate against Internet content, services, or applications after the proposed transactions are complete; nor do they explain how the changes in ownership resulting from the transactions could increase the merged entity's incentive to do so. If in the future, evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.[338]

119. The Commission also has adopted an *Internet Policy Statement* on broadband access to the Internet.[339] This statement reflects the Commission's view that it has the jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled services operate in a neutral manner. To ensure that broadband networks are widely deployed, open, affordable, and accessible, the Commission adopted four principles embodied in that *Internet Policy Statement*:

> (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; **(3)** consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[340]

The Commission held out the possibility of codifying the *Internet Policy Statement*'s principles where circumstances warrant in order to foster the creation, adoption, and use of Internet broadband content, applications, services, and attachments, and to ensure consumers benefit from the innovation that comes from competition. Accordingly, the Commission chose not to adopt rules in the ***Internet** Policy Statement*.[341] This statement contains principles against which the conduct of the merged entity and other broadband service providers can be measured. Nothing in the record of this proceeding. however, demonstrates that these principles are being violated hy AT&T or BellSouth or that the transactions before us create economic incentives that are likely to lead to violations. Additionally, as noted above,

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[331] ***See supra*** note 329.

[338] ***See Madison River Communications arid Affiliated Companies***, Order, 20 FCC Rcd 4295 (2005).

[339] ***Appropriare Framework for Broadband Access to the Internet over Wireline Fuciliries, Policy Statement***, CC Docket No. 02-33, 20 FCC Rcd 14986(rel. Sept. **23,** 2005)(*Internet* Policy *Statement*). We note that AT&T remains hound to its voluntary commitment in the ***SBC/AT&T Order*** that it will conduct business in a manner that comports with the principles set forth in the *Internet* ***Policy*** *Statement* through November 2007. ***See*** *SBC/AT&T Order*, 20 FCC Rcd at 18368, 18411, para. 144, Appendix F: ***see also*** Letter from Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed July 21, 2006).

[340] ***Internet*** *Policy Statement*, 20 FCC Rcd **at** 14987-88, para. 4. The Commission found that the principles adopted in the *Internet Policy* Statement are subject to reasonable network management. ***Id.*** at 14988, para. 5 n.15.

[341] ***Id.*** at 14988, para. 5

the vigorous growth of competition in the high-speed Internet access market further reduces the chances that the transactions are likely to lead to violations of the principles.

120. With respect to claims that the merged entity will have an increased incentive to discriminate against unaffiliated ISPs, we find that merger of AT&T and BellSouth is not likely to result in anticompetitive effects.'" The merger will have no impact on the rights and obligations of ISPs as related to wireline facilities-based providers."' Further, the fact that there are an increasing number of other broadband competitors should provide new opportunities for ISPs to provide service to customers in the combined AT&T/BellSouth territory."'

F. Internet Backbone Competition

121. We next turn to the potential competitive effects of the proposed merger on lnternet backbone services. We find that the proposed merger of AT&T and BellSouth is not likely to result in anticompetitive effects in any Internet backbone market. We also conclude that, while the merger may result in significant vertical integration, the record does not support commenters' concerns that the merger will "tip" the backbone market, resulting in increased supra-competitive transit prices, or lower service quality. In addition, we find insufficient evidence in the record to conclude that the merged firm will engage in packet discrimination or degradation against rivals' VoIP, IP video, and other IP-enabled services.

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[342] We note that Earthlink filed in the docket of this proceeding allegations that AT&T violated certain ADSL related voluntary commitments set forth in the *SBC/AT&T Order,* which were disputed by AT&T. **See** Letter from Donna N. Lampert, Counsel for Earthlink, to Marlene H. Dortch, Secretary. FCC, WC Docket 06-74, Attach. (filed Sept. 12, 2006); Letter from Gary L. Phillips, Gen. Atty and Asst. Gen. Counsel, AT&T Services, Inc., to Marlene H. Dortch. Secretary, FCC, WC Docket No. 06-74 (filed Sept. 20, 2006): Letter from Donna N. Lampert and Mark J. O'Connor, Counsel for Earthlink, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-74 (filed Sept. 27, 2006); Letter from Jack Zinman, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Oct. 3, 2006). TeleTruth likewise alleges that AT&T has failed to comply with conditions of previous mergers. **See** TeleTruth Condition Comments. Earthlink's and TeleTruth's allegations are more appropriately addressed via the Commission's complaint process.

[343] **See** *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to* **rhe** *Internet Over Cable Facilities.* GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798,4801, para. 4 (2002) *(Cable Modem Declaratory Ruling), affd, Nar'l Cable & Telecomms. Ass'n v. Brand X Internet Services,* 125 **S.** Ct. 2688 (2005) *(NCTA v. Brand X); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadbarid Providers; Review of* ***Regulatory*** *Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998* ***Biennial*** *Regulatory Review – Review of Computer III and ONA Safeguards arid Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband* ***Services*** *Provided Via Fiber to rhe Premises: Consumer Protection in the Broadband Era,* CC Docket Nos. 02-33, 01-337, 95-20, and 98-10, WC Docket Nos. 04-242 and 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ***(Wireline*** *Broadband Internet* ***Access*** *Services Order or Consumer Protection in* ***the*** *Broadband Era Notice), petitions for review pending. Time Warner Telecom v. FCC,* No. 05-4769 (and consolidated cases) (3rd Cir. tiled Oct. 26,2005).

[344] ***See*** *supra* para. 117.

1. Background

122. As the Commission recently explained,'" the Internet is an interconnected network of packet-switched networks. End users (individuals, enterprise customers, and content providers) typically, though not always. obtain access to the Internet through ISPs using **a** "dial-up" modem. cable modem, DSL, wireless network, or a dedicated high-speed facility (which the companies often call "Dedicated Internet Access" (DIA)). ISPs provide access to the Internet on a local. regional, or national basis, and most have limited network facilities. In order to provide Internet service to end users, ISPs and owners of other smaller networks inlerconnect with Internet backbone providers (IBPs), which generally are larger Internet backbone networks."" The backbone networks operate high-capacity long-haul transmission facilities and are interconnected with each other. Typically, a representative Internet communication consists of an ISP sending data from one of its customers to the IBP that the ISP uses for backbone services. The IBP. in turn, routes the data to another backbone network, which delivers the data to the ISP serving the end user **to** whom the data is addressed.'"

123. IBPs may exchange traffic either through "peering" or "transit" arrangements. Under a peering arrangement each IBP "peer" will accept and deliver, without charge, traffic destined either for its own network or for one of its own backbone customers.[348] Transit arrangements, by contrast, permit an ISP, small or regional IBP, or other corporate business, to reach the entire Internet using dedicated access lines linking it directly to the transit provider's Internet backbone network."' An IBP providing transit service enables the customer to send and receive traffic through the purchaser's IBP to any other network or destination on the Internet. Frequently, IBP customers obtain transit packaged with a dedicated high-

[345] ***See*** *SBC/AT&T* ***Order,*** 20 FCC Rcd at 18351-52, paras. 109-11; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18493-94, paras. 110-12.

[346] **An** ISP's traffic connects to a hackhone provider's network at a facility called a "point of presence" or "POP." Backbone providers have POPs in many locations, usually concentrated **in** more densely-populated areas where Internet end users' demands for access are highest. **An** ISP or end user relies on telecommunications lines to reach POPs. We note that large businesses often purchase dedicated lines that connect directly to Internet hackhone networks. See **U.S.** General Accountability Office, Characteristics and Competitiveness of the Internet Backbone Market, GAO-02-16 at 4 (Oct. 2001), ***available at*** http://www.gao.gov/new.items/d02l 6.pdf (GAO Internet Backbone Report).

[347] Once on an Internet hackhone network. digital data signals that were split into separate pieces or "packets" at the transmission point are separately routed over the most efficient availahlc pathway and reassembled at their destination point. The Internet Protocol (IP) Suite is the standard that governs the routing and transfer of data packets on the Internet. GAO Internet Backbone Report at 6.

[348] For example, if IBP **A** only has a peering arrangement with IBP B, and IBP B also has a peering arrangement with IBP C. then IBP B will not allow customers of IBP **A** to send traffic to or receive traffic from customers of IBP C. In order to provide access to customers of IBP C, IBP **A** must either peer with IBP ***C*** or enter **a** transit agreement (*i.e.*, pay for a connection) with IBP B or IBP C. Decisions about peering are not regulated. but are the product of negotiations in the marketplace.

[349] That is, in a transit arrangement, an IBP agrees to deliver all Internet traffic that originates or terminates on the paying IBP's hackhone regardless of the destination or source of that traffic. Thus, if IBP **A** becomes a transit customer of IBP B. then as a paying customer of IBP B, IBP **A** is able to send traffic to and receive traffic from IBP C via IBP B's network.

speed facility as part of a DIA service, with the transit customers paying fees for both the connection and the transit service.'"

124. IBPs generally can be categorized into tiers based on their size, geographic scope, and interconnections. "Tier 1" IBPs consist of a small group of the largest IBPs that sell transit and/or dedicated Internet access to substantial numbers of ISPs and corporate customers or other enterprise customers. These Tier 1 IBPs peer with all other Tier 1 IBPs on a settlement-free basis. Lower tier IBPs may peer with each other, but generally must purchase transit from a higher tier IBP to reach those end users that are not customers of the networks of their peers.[351]

2. Relevant Markets

a. Relevant Product Market

125. Consistent with prior Commission orders, and based on the record here, we find that Tier 1 backbone services – the transporting and routing of packets between ISPs and large enterprise customers and Internet backbone networks – constitutes a separate relevant product market."[352] In this regard, we note key differences in quality and price between the transit and **DIA** services offered by Tier 1 and lower tier IBPs. For example, lower tier IBPs, ISPs, and multi-location enterprise customers typically seek service from a provider that can serve all their locations, and not all IBPs with POPs in a particular location will have such reach to all other locations. Only Tier 1 providers can offer such a high level of ubiquitous service. We find that there are no substitutes for these Tier 1 connectivity services sufficiently close to defeat or discipline a small but significant nontransitory increase in price.'"[353]

b. Relevant Geographic Market

126. Consistent with Commission precedent and the DOJ's previous findings, we analyze the market for Tier 1 IBPs using a national geographic market."[354] Although Consumer Federation *et al.*

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[350] Some IBPs also offer "paid peering," where the "paid peer" pays on a volume basis to exchange traffic, but the quality of interconnection is similar to setllement-free peering. By contrast, traffic exchanges involving a transit provider may experience up to nine inter-network connections, or "hops," over the originating, transiting, and terminating networks, reducing efficiency and reliability and increasing latency and potential packet **loss.**

[351] IBPs establish a variety of peering criteria that are used when deciding whether to begin peering with, or to continue peering with, other IBPs. These criteria generally specify factors such as ratios of traffic exchanged between the backbones, the geographic scope and capacity of the peering networks' backbone facilities, and the number of interconnection points, among other things. ***See SBC/AT&T Order, 20*** FCC Rcd at 18352, para. 111; ***Verizon/MCI Order,*** 20 FCC Rcd at 18494, para. 112.

[352] ***See SBC/AT&T Order,*** 20 FCC Rcd at 18352, para. 112; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18494. para. 113; ***WorldCom/MCI Order,*** 13 FCC Rcd at 18106, para. 148. The DOJ defines a Tier 1 provider as a provider that has (i) high-capacity networks nationwide or internationally and (ii) settlement-free interconnection arrangements with all other Tier 1 providers. ***See United States v. WorldCom, Inc.*** arid *Sprint* ***Carp.,*** Case No. 1:00-CV-01526, Complaint at para. 27 (D.D.C. filed June 27, 2000) (***DOJ-WorldCom/Sprint Complaint***).

[353] *See SBC /AT&T* ***Order, 20*** FCC Rcd at 18352, para. 112; ***Verizon/MCI Order, 20*** FCC Rcd at 18494, para. 113; ***DOJ-WorldCom/Sprint Complaint*** at para. 31.

[354] *See SBC /AT&T* ***Order,*** 20 FCC Rcd at 18352. para. 114; ***Verizon/MCI Order,*** 20 FCC Rcd at 18495, para. 115; ***WorldCom/MCI Order,*** 13 FCC Rcd at 18106, para. 148; ***DOJ-WorldCom/Sprint*** *Complaint* at para. 31.

contend that IBP markets have local or regional characteristics,[355] there is no evidence in the record to suggest that the characteristics of the IBP market in BellSouth's in-region territory differs from the rest of the country.[356] Consequently, we find it appropriate to evaluate Tier 1 backbone services at the national level.

c. Market Participants

127. Based on our prior decisions and the record evidence, we find that there likely are between six and eight Tier 1 Internet backbone providers based on the definition of Tier 1 backbones that has been used in the past:[357] AT&T, Verizon. Sprint, Level 3, Qwest, Global Crossing, and likely SAVVIS and Cogent.[358] These eight providers offer dedicated Internet access and transit services primarily to ISPs and enterprise customers, and they generated **[REDACTED]** in revenues in 2003, the most recent year for which revenue data is available.[359] In choosing an IBP. ISP and enterprise customers seek the lowest price, highest quality, and broadest geographic reach consistent with their needs, and these Tier 1 backbone providers compete vigorously on these bases.

128. The Applicants argue that, based on the above definition of a Tier 1 provider, there may well be other competitively significant, nearly fully peered backbones beyond those listed above.[360] We find no evidence, however, that other networks could provide viable competitive alternatives for customers seeking transit if there were to be a small but significant and nontransitory increase in price by domestic Tier 1 IBPs. We therefore limit our analysis to these eight Tier 1 IBPs.

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[355] Consumer Federation *et al.* Reply Comments, Reply Declaration of Mark N. Cooper and Trevor Roycroft (Consumer Federation *et al.* Cooper/Roycroft Reply Decl.) at 58.

[356] Similarly. although NTCA claims that a majority of its members have access to two or fewer IBPs, it is unclear whether NTCA's members are referring to Tier 1 IBPs or lower tier IBPs. NTCA Reply at 2-3. The record contains no evidence that AT&T competes for NTCA members' IBP business, much less that it competes against BellSouth for thar business. Thus, there is no evidence that the integration of the AT&T and BellSouth IBP networks will have any direct impact on the availability or price of IBP services for NTCA members. We do, however, recognize the unique concerns of rural carriers expressed by NTCA and others concerning a potential lack of options for access to Internet backbones at reasonable rates, terms, and conditions. *See, e.g.*, Letter from Daniel Mitchell, Vice President, Legal and Industry. NTCA. and Karlen Reed, Regulatory Counsel, Legal and Industry, NTCA. to Marlene H. Dortch, Secretary, FCC, WC Docket 06-74 at 2 (tiled Dec. 15, 2006). Nonetheless, we commit to monitor vigilantly the competitive conditions unique to rural areas and will take action, as necessary, to ensure that the benefits of the Internet are extended throughout the United States. We also commit to addressing these concerns in other on-going rulemakings, including the *IP-Enabled Services* proceeding. *See IP-Enabled Services NPRM*, 19 FCC Rcd 4863.

[357] See *SBC/AT&T Order*, 20 FCC Rcd at 18353-54, para. 115; *Verizon/MCI Order*, 20 FCC Rcd at 18495, para, 116.

[358] *See SBC/AT&T Order*, 20 FCC Rcd at 18353-54, para. 115; *Verizon/MCI Order*. 20 FCC Rcd at 18495, para. 116; see *also* TWTC Petition at 27.

[359] *SBC/AT&T Order*, 20 FCC Rcd at 18353-54, para. 115; *Verizon/MCI Order*, 20 FCC Rcd at 18495, para. 116; AT&T/BellSouth Reply, Declaration of Marius Schwartz (AT&T/BellSouth Schwartz Reply Decl.) at 8-12.

[360] See AT&T/BellSouth Schwartz Reply Decl. at 2 n.4

3. Competitive Analysis

129. For the reasons given below, we find that the merger is not likely to result in anticompetitive effects either through unilateral action by the merged entity or possible tipping of the Tier 1 Internet backbone market to a monopoly or duopoly. We also find it unlikely that the remaining Tier 1 IBPs would engage in coordinated interaction as a result of the merger. Finally, we are not persuaded that the vertical aspects of the proposed merger would increase the merged firm's incentive and ability to raise rivals' costs by discriminating against the IP traffic of its broadband competitors or by raising the price of special access services to its backbone competitors.

a. Horizontal Effects of the Merger

130. As the Commission previously has explained, the Internet backbone market is characterized by "direct network effects," where the value of the network increases with each additional user who Joins it."[361] Because of these strong network effects, the Commission and the DOJ have recognized that, if one backbone provider were to become significantly larger than the others, or if it were to develop greater negotiating power, there is a danger that this dominant provider might be able to "tip" the Internet backbone market into monopoly and then raise prices for all transit services.[362] By contrast, in a market where each backbone provider derives roughly equal benefit from settlement-free access to the other backbone providers' customers, the incentive to cooperate will predominate and the market participants will peer with each other. Thus, because of these strong network effects, the Commission and the DOJ have focused on whether a merger between two Tier 1 IBPs is likely to lead the Internet backbone market to tip into a situation in which one or two backbones dominate.[363]

131. We begin our horizontal analysis by examining the relative market share of AT&T and BellSouth in the Tier 1 IBP service market. We then examine the record evidence in this proceeding and conclude that the proposed merger would not create a backbone provider of sufficient size to cause tipping, either directly because of the addition to AT&T of BellSouth's Internet revenues and traffic, or indirectly after AT&T engaged in a strategy of targeted de-peering, as some commenters allege will occur.

132. ***Market Shares.*** As the Commission previously noted,[364] no complete and reliable data sources are available to measure relative shares of Internet backbone providers. Although the Applicants and commenters have provided three measures of market share – "eyeballs" (*i.e.*, an IBP's immediate

[361] *SBC/AT&T Order, 20* FCC Rcd at 18354, para. 117; *Verizon/MCI Order, 20* FCC Rcd at 18496, para. 118; *see also DOJ-WorldCom/Sprint Complaint at* para. *36;* Jacques Cremer *et al.*, *Connectivity in the Commercial Internet*, 48 J. IND. ECON. 433, 458-60 (2000).

[362] *See DOJ-WorldCom Sprint Complaint* at para. 41; *SBC/AT&T Order, 20* FCC Rcd at 18354, para. 117; *Verizon/MCI Order,* 20 FCC Rcd at 18496, para. 118; *WorldCom/MCI Order,* 13 FCC Rcd at 18108-09, para. 150.

[363] *See DOJ-WorldCom Sprint Complaint*; *SBC/AT&T Order,* 20 FCC Rcd at 18354, para. 117; *Verizon/MCI Order, 20* FCC Rcd at 18496, para. 118.

[364] *SBC/AT&T Order,* 20 FCC Rcd at *18356,* para. 122; *Verizon/MCI Order*, 20 FCC Rcd at 18498, para. 123.

customers); traffic; and revenues[365] – it does not appear that any single measure uniquely captures the relative size and importance of competing Internet backbone providers."'

133. The Applicants argue that the best measure of market share is "eyeballs."[367] They further contend however that we should only consider an IBP's "installed base" (*i.e.*, its share of small business and residential customers) and ignore large customers who, the Applicants contend, can easily switch providers.[368] The Applicants claim that, after the merger, they would have 23 percent of all residential and small-business customers.[369] TWTC responds that the Applicants do not provide the number of medium and large business lines they would have after the merger, and that the Applicants may therefore understate their share of the market.[370] Although ease of switching is a factor in determining the competitive effects of a large market share, standard competitive analysis includes all of a company's current customers in determining its share of the market. Moreover, we are measuring here the Applicants' post-merger share of the ***Tier 1 IBP market.*** The number of small business and residential end-user customers would appear to he a better measure for *ISP mass market* services. We therefore conclude that the number of small users is not a good measure of a Tier 1 IBP's size and relative strength."'

134. The Applicants contend that traffic figures provide the next best measure **of** a firm's size,[372] although they argue that, because much of this traffic can easily he switched to alternative IBPs, traffic market shares may paint a distorted picture of a company's true market power."' The Applicants assert that, post-merger, they would carry approximately 20 percent of all Internet traffic, [374] though they also present data showing AT&T's share of Tier 1 Internet traffic."' As the Commission did in the

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[365] AT&T/BellSouth Schwartz Reply Decl. at 5-12. "Eyeballs" are the number of an IBP's direct customers, the customers of the ISPs to whom it provides transit and its dedicated Internet access (DIA) customers, typically larger businesses. *Id.* Traffic is determined by measuring the amount of data that is transferred during a certain length of time (*e.g.*, gigabytes per month). The Applicants have submitted data provided by RHK, Inc. for the industry as a whole. AT&T/BellSouth Schwartz Reply Decl. at 7-8 and Table 1. Revenues are the revenues earned from providing transit to ISPs and from providing connectivity to DIA customers. ***See*** AT&T/BellSouth Schwartr Reply Decl. at 8-9.

[366] ***See*** AT&T/BellSouth Schwartz Reply Decl. at 5-8.

[367] ***Id.*** at 7.

[368] *Id.* at 5-6.

[3b9] ***Id.*** at 6.

[370] TWTC Petition at 31

[371] Consumer Federation *et al.* argue that the inability of a significantnumber of customers to switch easily from the Applicants' DSL service to another provider may also be a matter of concern. Consumer Federation *et al.* Cooper/Roycroft Reply Decl. at 60-61. We discuss this contention below. ***See*** *infra* para. 146.

[372] AT&T/BellSouth Schwartz Reply Decl. at para. 14.

[373] *Id.*

[374] *Id.* at para. 15

[375] AT&T/BellSouth Schwartz Reply Decl. at para. 16 and Table 1. In addition to 2004 traffic data submitted in their Application and Reply, the Applicants have submitted traffic data for Tier 1 IBPs for 2005. Letter from Scott (continued ...)

SBC/AT&T Order, we reject the Applicants' attempt to calculate market share by examining their share of all Internet traffic rather than their share of Tier 1 IBP traffic.[376] Although the Tier 1 traffic data is imperfect, we conclude that the traffic shares of Tier 1 IBPs offer some insight as to the relative size (and possible market power) of the Tier 1 IBPs.[377]

135. Various commenters, following the Commission's analysis in the *SBC/AT&T Order* and the *Verizon/MCI* ***Order,*** rely on revenue estimates to estimate market share.[378] Although AT&T presented revenue data in its earlier merger application,[379] the Applicants here argue that the revenue estimates relied upon in the ***SBC/AT&T Order*** and the ***Verizon/MCI Order*** suffer from a number of shortcomings.[380] In an attempt to rectify these alleged shortcomings, the Applicants adjusted the IDC revenue data developed by IDC by substituting internal revenue data for their two companies and then recalculated the Applicants' pre- and post-merger market shares.[381]

136. Consistent with our most recent decisions, we reaffirm our conclusion that, in principle, revenue is the most informative measure of the three proposed metrics.[382] In light of concerns regarding the revenue data in the record, however, we consider all three measurements as we analyze the competitive effects of this transaction. We also are mindful, however, that market share is only the beginning of the competitive analysis, not the end.[383] Market share is only one indicator of the likely anti-competitive effects of a proposed merger.[384]

(Continued from previous page)
Feira. Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Aug. 16, 2006). [REDACTED] ***See*** *id.* at 2-3; AT&T/BellSouth Schwartz Reply Decl. at para. 15.

[376] ***SBC/AT&T Order,*** 20 FCC Rcd at 18356. para. 122; ***see*** *also* ***Verizon/MCI Order, 20*** FCC Rcd at 18498, para 123.

[311] ***See, e.g.***, ***SBC/AT&T Order,*** 20 FCC Rcd at 18356, para. 122; ***Verizon/MCI Order, 20*** FCC Rcd at 18498, para. 123.

[37X] ***See*** TWTC Petition at 28-29; Consumer Federation *at al.* Cooper/Roycroft Reply Decl. at 59. In the ***SBC/AT&T*** Order, the Commission determined that AT&T had approximately a [REDACTED] share of the Tier 1 IBP market based on 2003 revenues. ***See SBC/AT&T Order, 20*** FCC Rcd at 18356, para. 123.

[379] ***See*** *SBC/AT&T* ***Order,*** 20 FCC Rcd at 18355-56, paras. 121-122.

[380] AT&T/BellSouth Schwartz Reply Decl., paras. 17-25. First. they argue that revenue is a poor proxy for the size of the customer base because large customers pay lower prices per end-user. *Id.* at paras. 17-18. The Applicants also contend that companies often categorize revenues differently. thus making it difficult for third parties to accurately determine the true amount of revenues attributable lo a company's IBP business. *Id.* Finally, they contend that the IBP revenues reported by IDC (a market research company that provided the data used by the Applicants) greatly overstate their own revenues. ***Id.*** at paras. 20-22.

[181] *Id.* at paras. 10-12 and Table 2. The data reveal that BellSouth's Internet revenues are approximately [REDACTED]% of AT&T's. ***Id.***

[382] *SBC/AT&T* ***Order.*** 20 FCC Rcd at 18356, para. 122; ***Verizon/MCI Order.*** 20 FCC Rcd at 18498, para. 123

[383] ***Cingular/AT&T Wireless*** Order, 19 FCC Rcd at 21564, para. 96; ***WorldCom/MCI*** *Order*, 13 FCC Rcd at 18050, 18100-01, paras. 39, 135.

[384] ***See DOJ/FTC*** *Guidelines* § 2.0.

137. *Unilateral Effects – **Tipping.*** In the proposed *WorldCom/MCI* merger, the Commission and the DOJ concluded that the merged entity, absent divestiture, would have been so large relative to other Tier 1 IBPs as to raise a significant danger of "tipping" the market to monopoly.[385] In contrast, in the recent *SBC/AT&T Order* and *Verizon/MCI Order*, the Commission found that the Tier 1 market had since become less concentrated and that the proposed mergers were not likely to cause the IBP market to tip to either monopoly or duopoly.[386]

138. Various commenters contend that this merger would create a dominant Tier 1 backbone monopoly or duopoly, threatening the currently competitive market for Internet backbone services.[387] These commenters claim that the merger will increase the merged firm's market share and reduce the Internet backbone market shares of competing Tier 1 providers. TWTC argues that, in evaluating the risk of tipping, we should he concerned if AT&T's post-merger share would exceed 37 percent, which is the share that the merged entity would have had in the rejected WorldCom/Intermedia merger.'"

139. The Applicants deny that the proposed merger will reduce competition in the Internet backbone market.[389] They first argue that BellSouth has only a modest regional backbone network and is not a Tier 1 IBP. Thus, as was the case in the SBC/AT&T transaction, the proposed merger will not remove an existing Tier 1 IBP, and several Tier 1 IBP competitors with significant market shares will remain.'" The Applicants also argue that a strategy of global de-peering of other Tier 1 IBPs would require a far larger customer base than AT&T will possess, whether measured by "eyeballs", traffic, or revenues.[391] Finally, they argue that a strategy of targeted de-peering would not be effective.[392] They contend that a market share of **at** least 50 percent is needed for any of these strategies to be successful, and they claim that they will not have such a share post-merger.'"

140. We are satisfied that the proposed merger will not increase horizontal concentration to such an extent that it **is** likely to result in anticompetitive effects in the Internet backbone market. Examining revenue data, we find that AT&T has a pre-merger share of the Tier 1 IBP services market between

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[385] The DOJ also reached this conclusion with respect to the *WorldCom/Sprint* merger. ***DOJ-WorldCom/Sprint Complaint*** at para. 35.

[386] ***SBC/AT&T Order,*** 20 FCC Rcd at 18355-66, paras. 119-39; ***Verizon/MCI Order,*** 20 FCC Rcd at 18492-507, paras. 109-38.

[387] ***See.*** *e.g.*, TWTC Petition at 25-32; Consumer Federation *et al.* Reply at 17; Consumer Federation *et al.* Cooper/Roycroft Reply Decl. at 57-62; NTCA Reply at 2-3; OPASTCO June 16 *Ex **Parte*** Letter at 3: Oregon Companies Reply at ***3.*** The commenters' arguments regarding the risk of duopoly are discussed in the Coordinated Effects section below. ***See*** *infra* para. 148 **et** *seq.*

[388] **See** TWTC Petition at 28-29 (citing *United States v. WorldCom, Inc. and Intermedia Communications, Inc.*, Case No. 1:00-CV-02789, Competitive Impact Statement at 9-10 (D.D.C. filed Dec. 21, 2000)).

[389] ***See*** AT&T/BellSouth Reply at 74-82; AT&T/BellSouth Schwartr Reply Decl. at paras. 4-29.

[390] AT&T/BellSouth Schwartz Reply Decl. at paras. 4-5

[391] *Id.* at paras. 6-9.

[392] *Id.* at paras. 26-29

[393] ***Id.*** at para. ***8.***

[REDACTED] percent and **[REDACTED]** percent and, adding BellSouth's IBP revenues to AT&T's, will have a post-merger share between **[REDACTED]** percent and **[REDACTED]** percent."[394] The pre-merger HHI is between **[REDACTED]** and the post-merger HHI is between **[REDACTED]**.[395] The change in HHI is between **[REDACTED]**.[396] Alternatively, looking at traffic data, we find that AT&T has a pre-merger share of **[REDACTED]** percent and, adding BellSouth's traffic to AT&T's, will have a post-merger share of **[REDACTED]** percent."[397] The pre-merger HHI is **[REDACTED];** the post-merger HHI is **[REDACTED];** and the change in HHI is **[REDACTED].**[398] It is noteworthy that, using either set of data, the change in the HHI is relatively small.

141. In addition, we note that BellSouth is not a Tier 1 backbone itself; thus, the merger will not reduce the number of Tier 1 providers. Second, BellSouth currently has peering agreements with both Tier 1 and non-Tier 1 backbones and **[REDACTED]**.[399] **[REDACTED]."[400]**

142. Even if AT&T were to route all of BellSouth's traffic over AT&T's backbone (*i.e.*, both its transit traffic and the traffic currently routed through peering agreements), we find that competition in the Tier 1 IBP market would not be significantly affected. BellSouth is relatively small compared to AT&T (*e.g.*, its Internet revenues that are only **[REDACTED]** percent of AT&T's). Thus, even if all of its traffic and revenues were added to AT&T's, AT&T's market share would not increase significantly.

143. We further find that the merger does not change the market ranking of the Tier 1 backbones, and that several Tier 1 competitors with significant market shares will remain in the market post-merger. In addition, we note that some backbone providers appear to have higher shares of traffic than of revenue. In particular, we note that the 2004 traffic data show that Level 3's share of Internet traffic had surpassed old AT&T's.[401] Finally, we observe that the market shares for Tier 1 backbones have fluctuated over time, suggesting that the market is both competitive and dynamic. Therefore, we agree

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[394] *See* Appendix E, Tables 1 and 2. Table 1 is based on actual 2003 revenue data for the Applicants and IDC's revenue estimates for the other Internet backbone providers tracked by IDC. In contrast, Table 2 is based entirely on IDC's 2003 revenue estimates for the Internet backbone providers tracked by IDC. The results reported in Tables 1 and 2 may overstate or understate the carriers' relative standings depending upon the extent tu which the carriers' actual revenues differ from IDC's revenue estimates. **See** AT&T/BellSouth Schwartz Reply Decl. at paras. 20-25. As discussed further below, we note that BellSouth is not a Tier 1 IBP, and thus its IBP revenues are not currently part of the Tier 1 IBP market. With respect to AT&T's post-merger market share. we reject TWTC's argument that we should adopt 37% as a tipping point trigger. The Tier 1 IBP market has become more competitive since the proposed *WorldCom/Intermedia* transaction. *SBC/AT&T Order,* 20 FCC Rcd at 18355-66, paras. 119-39; *Verizon/MCI Order,* 20 FCC Rcd at 18497-507, paras. 120-38. The Commission has since approved the mergers of SBC/AT&T and Verizon/MCI where the parties had a combined market share above that level.

[395] Appendix E, Tahles 1 and 2

[396] *Id*

[397] Appendix E, Table 3

[398] *Id.*

[399] **See** BellSouth Info. Req., Exh. 28e

[400] **[REDACTED]** *See* BellSouth Info. Req., Exh. 28e.

[401] *SBC/AT&T Order,* 20 FCC Rcd at 18363-64, para. 135

with the Applicants that the proposed merger is unlikely to create a single dominant Tier I Internet backbone provider with a market share that is overwhelmingly disproportionate to its rivals, which was the key concern in prior backbone mergers.

144. We also conclude that the merged entity will not have sufficient market share and negotiating leverage to engage in targeted de-peering of rival Tier I IBPs. We find that AT&T's post-merger market share is too small for it to be able to engage in targeted de-peering of rival lnternet backbones, particularly when viewed in light of the significant market shares of other Tier I backbones. While AT&T might have some increased negotiating leverage over smaller backbone providers, we conclude that it will lack the ability to target its larger rivals, including Verizon, Sprint, Level 3, and Qwest, all of which command significant revenue shares of the backbone market.[402] These providers each have unique advantages in the backbone services marketplace and likely would provide significant counterweight to the merged entity. For example, as the Commission noted in the *SBC/AT&T Order* and the *Verizon/MCI Order*, the recent merger of Sprint and Nextel created a stronger backbone and wireless competitor,"" Sprint/Nextel since has teamed with several large cable companies to offer video, broadband Internet access, VoIP and wireless service together (a "quadruple play").[404] Based on the foregoing, we conclude that there is not a significant risk that AT&T would be able to dominate the Tier 1 **IBP** service market through a strategy of targeted de-peering.

145. *"Eyeballs."* Certain commenters also ask that the Commission examine whether AT&T's increased control of "eyeballs" after the merger would give it significant market power. Commenters claim that the proposed merger would give AT&T an increased ability to serially de-peer its rivals, degrade the quality of interconnection among backbones, and increase transit prices to disadvantage its backbone rivals and retail competitors served by competing lnternet backbones (even at the expense of its wholesale backbone business).[405]

146. The Applicants acknowledge that small business and residential customers may be mare "sticky" than other customers (*i.e.*, they may be more reluctant to change providers than other customers in response to an increase in price or decrease in quality). In the *SBC/AT&T Order* and the *Verizon/MCI Order*, however, the Commission questioned the extent of that "stickiness" in practice."' Moreover, as the Applicants point out, after the merger, AT&T will have only **23** percent of the country's residential and small business lines.[407] Further, as the Commission found in the *SBC/AT&T Order* and the

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[402] For example, Verizon has **a** revenue market share **of [REDACTED].** ***See*** Appendix E, Tables 1 and 2,

[403] *SBC/AT&T Order*, 20 FCC Rcd at 18364, para. 135: *Verizon/MCI Order*, 20 FCC Rcd at 18505-06, para. 136; *see also. e.g.*, Sprint News Release "Sprint Extends Mobility Leadership with Aggressive Broadband Network Expansion" (Mar. 30, 2006).

[404] *See* Sprint News Release, "Sprint Nextel, Comcast, Time Warner Cable. **Cox** Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture" (Nov. 2, *2005)*

[405] ***See*** Consumer Federation *et al.* Cooper /Roycroft Reply Decl. at 60-61; TWTC Petition at 31

[406] *SBC/AT&T* ***Order,*** 20 FCC Rcd at 18359, para. 128; *Verizon/MCI Order*, 20 FCC Rcd at 18501-02, para. 129.

[407] AT&T/BellSouth Application at 103. TWTC contends that the Applicants did not provide a figure for the percentage of medium and large business lines they will control following the merger. TWTC Petition at 31. As discussed above. however, concerns regarding "eyeball" customers apply primarily to small business and residential customers.

Verizon/MCI Order, there are other Tier 1 backbones with access to significant numbers of their own "eyeball" customers that plan to expand that customer base (*e.g.*, by offering broadband and 3G wireless services).[408] Thus. even if "eyeballs" confer additional leverage in peering negotiations, as some commenters claim, other Tier 1 backbones besides AT&T (or Verizon) either currently have, or have the potential to acquire, significant numbers of broadband "eyeballs." We therefore are not persuaded by opponents' arguments that AT&T's ability to de-peer other Tier 1 IBPs or its market power generally would increase significantly because of the additional "eyeballs," which AT&T's backbone will acquire as a result of this merger.

147. More generally, and consistent with the Commission's conclusion in the *SBC/AT&T Order* and the ***Verizon/MCI*** *Order*,[409] we are not convinced that the merged firm would gain enough by disadvantaging its Internet access and retail competitors to alter the pre-merger calculus that led to the current peering equilibrium. If AT&T were to de-peer one or more of its Tier 1 peers, it could not be certain that the targeted backbone would become a transit customer of AT&T or that the customers of the former peer would switch to the AT&T backbone. The former peer might instead choose to purchase transit from a competing Tier 1 backbone, which would tend to increase the rival's market significance relative to AT&T, and thus, a decision to de-peer could end up primarily benefiting one of AT&T's rivals. We also find that disaffected Internet access providers or retail competitors that were customers of the former peer could choose from a wide range of competing IBPs. As the Commission previously observed, peering and de-peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs, and we do not see how the proposed merger would materially alter this calculus.[410]

148. *Coordinated* ***Effects.*** Commenters also suggest that, after the merger, AT&T and Verizon together might come to dominate the Tier 1 IBP market and then engage in coordinated interaction.[411] We conclude that the proposed merger will likely not result in competitive harms due to coordinated interaction among Tier 1 backbone providers. First, because the acquisition of BellSouth does not significantly increase AT&T's share of the Tier 1 IBP services market, we find it unlikely that the merger will increase significantly the probability of coordinated interaction compared with conditions before the merger. Moreover, we find no evidence in the record that would cause us to reach a conclusion different from the Commission's conclusion in the ***SBC/AT&T Order*** and the ***Verizon/MCI Order*** that such coordinated interaction is unlikely.[412] More specifically, in those orders, the Commission concluded that "[b]ecause sufficient vigorous Tier 1 backbone competitors would remain (even if some current backbone providers were de-peered), the feasibility of such coordinated strategies is questionable."[413] Or put differently, the argument that the merger will result in coordinated effects appears premised on the assumption that AT&T or other firms will be able to de-peer a sufficient number of Tier 1 backbones so as to make coordinated effects likely. We find this assumption to be speculative and not supported by the

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[408] ***SBC/AT&T Order,*** 20 FCC Rcd at 18359, para. 127 n.374; ***Verizon/MCI Order,*** 20 FCC Rcd at 18500, para. 128 n.377.

[409] ***SBC/AT&T Order,*** 20 FCC Rcd at 18360-61, para. 129; ***Verizon/MCI Order, 20*** FCC Rcd at 18502, para. 130

[410] ***SBC/AT&T Order. 20*** FCC Rcd at 18360-61, para. 129; ***Verizon/MCI Order,*** 20 FCC Rcd at 18502, para. 130.

[411] ***See*** TWTC Petition at 27; Consumer Federation ***et al.*** Cooper/Roycroft Reply Decl. at 59-61.

[412] ***SBC/AT&T Order,*** 20 FCC Rcd at 18364-65, para. 136; ***Verizon/MCI Order,*** 20 FCC Rcd at 18506, para. 137

[413] ***SBC/AT&T Order,*** 20 FCC Rcd at 18365, para. 136; ***Verizon/MCI Order,*** 20 FCC Rcd at 18506, para. 137.